Supreme Court, U.S.
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No. 91-1273

In The

Supreme Court of the United States

October Term, 1991

DOCTOR NUI LOA PRICE, et al.,

Petitioners,

v.

STATE OF HAWAII, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT HONOLULU SAILORS HOME SOCIETY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Complaint filed July 21, 1989 in the United States District Court for the District of Hawaii, state a claim for relief under 42 U.S.C. Sec. 1983 against Respondent Honolulu Sailors Home Society, a Hawaii non-profit corporation?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE NINTH CIRCUIT COURT

The Respondent filing this brief is the Honolulu Sailors Home Society, a Hawaii non-profit corporation, and was a defendant named in the Complaint. There are no parent companies, subsidiaries or affiliates of such corporation.

The Petitioners are Doctor Nui Loa Price, also known as Maui Loa, the Hou Hawaiians and Kamuela Price.

Other private party Respondents are: HFSL Corp., a Hawaii corporation, dba Harbor Associates, Peter S. Smith, dba Smith Development Corp., Glenn K. Okada, dba GKO Corp. and HonFed Bank, a Federal Savings Bank.

The State Respondents are: State of Hawaii, William W. Paty, Individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi and Herbert Arata, Individually and as Members of the Board of Land and Natural Resources of the State of Hawaii, John Waihee, Individually and as Governor of the State of Hawaii.

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STATEMENT OF THE CASE

On March 21, 1893 the Provisional Government of Hawaii conveyed land in the City of Honolulu to the Honolulu Sailors Home Society for a Sailor's Home. The deed, which was recorded, recites in part, " . . . if the herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." (App. p. 5)

On July 21, 1989, Petitioners filed their Complaint For Relief Under 42 U.S.C. Sec. 1983 (App. pp. 1-17). It named as Defendants the State of Hawaii, William H. Paty and others (collectively "State Defendants"), but it also named as Defendants Honolulu Sailors Home Society "HSHS" and other private parties.

Regarding HSHS and the other private parties, the Complaint in summary alleges that on October 3, 1969 HSHS entered into a lease for residential and commercial leasehold condominium project (App. pp. 5-6); that the "Subject Property" reverted by operation of law to the State of Hawaii in trust because of said lease (App. p. 11); that since October 3, 1969 HSHS and others have wrongfully received rents, issues and profits, and the State Defendants as Trustees owed a duty to Plaintiffs to recover the property and the rents, issues and profits wrongfully received (App. p. 14, para. 37 and 41). Paragraph 47 alleges:

> "47. Defendants, acting under color of state law, have deprived Plaintiffs of rights guaranteed to them by Section 5(f) of the Admission Act." (App. p. 15).

On September 13, 1989 the State Defendants filed a Motion To Dismiss Complaint And Action Or In The Alternative Summary Judgment. On October 27, 1989 HSHS filed a Motion To Dismiss Complaint And Action Or In The Alternative Summary Judgment. Both motions were granted on the basis of failure to state a claim. Regarding the private defendants, the District Court held Plaintiffs have clearly failed to plead facts that would assert a Section 1983 claim against the private defendants. It noted private persons and organizations are not generally acting under "color of law" and not ordinarily subject to Section 1983 actions. Judge Harold M. Fong characterized the allegations as "completely private acts not taken under color of state law." (See Petitioners App. p. 29.) The Ninth Circuit Court of Appeals affirmed. (Petitioners App. pp. 1, 9-12).

SUMMARY OF ARGUMENT

The Complaint was based on an alleged violation of 42 U.S.C. Sec. 1983 which does not generally lie against a private party. To lie against a private party, there must exist a conspiracy, joint activity, or a close relationship so as to make the private party, in essence, a state actor. The rules of pleadings require that there be allegations of overt acts by the private party to support the claim, and conclusionary allegations will not suffice. The dismissal of the Complaint as to HSHS and the other private parties was proper, as the Complaint did not allege any facts which would make them state actors, or make their acts as state action.

ARGUMENT

A. 42 U.S.C. SEC. 1983 DOES NOT APPLY TO A PRIVATE ENTITY, UNLESS IT IS SHOWN TO BE A STATE ACTOR.

HSHS is a Hawaii non-profit corporation, and as a private entity is not generally subject to the reach of 42 U.S.C. Sec. 1983. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). The Civil Rights Act may apply to a private party who by conduct becomes a "state actor." This can occur when the private party has (1) acted together with state officials, (2) obtained significant aid from state officials or (3) the conduct is chargeable to the state. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936-37, 102 S.Ct. 2744, 2753, 73 L.Ed. 482 (1982). A private person may also become a state actor if the relationship is so close as to be symbiotic. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961).

B. THE COMPLAINT FAILS TO ALLEGE ANY ACTS ON THE PART OF RESPONDENT HONOLULU SAILORS HOME SOCIETY WHICH WOULD MAKE IT A STATE ACTOR.

The rule of pleadings in a civil rights case is that a plaintiff must allege overt acts on the part of a defendant that support the claim. Conclusionary allegations are not sufficient. *Jones v. Community Redevelopment Agency*, 733 F.2d 646 (9th Cir. 1984). *Malachowski v. Keene*, 787 F.2d 704, 711 (1st Cir. 1986) cert. den. 479 U.S. 828, 107 S.Ct. 107, 93 L.Ed.2d 56, reh. den. 479 U.S. 1022, 107 S.Ct. 681, 93 L.Ed.2d 731; *Straus v. City of Chicago*, 760 F.2d 765, 767-8

(7th Cir. 1985); *Zemsky v. City of New York*, 821 F.2d 148, 151 (2nd Cir. 1987), cert. den. 98 L.Ed.2d 396, 108 S.Ct. 457, reh. den. 100 L.Ed.2d 221, 108 S.Ct. 1760; *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), cert. den. 442 U.S. 941, 99 S.Ct. 2883, 61 L.Ed.2d 311. See also 2A J. Moore & Lucas, *Moore's Federal Practice*, Sec. 8.13 at p. 8-111 (2d Ed. 1983).

A careful reading of the rather lengthy Complaint in this case makes clear there are no allegations of any joint conduct or action between the State of Hawaii and its officials on the one hand and HSHS or any of the private defendants, nor are there any allegations that the alleged violation of Plaintiffs' rights by HSHS (or the other private defendants) is fairly attributable to the State of Hawaii or its officials.

Judge Harold M. Fong correctly concluded there was no pleading of sufficient facts to show that private defendant HSHS was acting under color of state law. (See Petitioners App. p. 29a). The Ninth Circuit Court correctly affirmed the dismissal of the private defendants (Petitioners App. p. 12a).

Respondent HSHS files this separate Brief in Opposition to the Petition, because as a private entity it has grounds separate from those of the State Respondents. Therefore, even if the Petition were to be granted as to any State Respondents, it should be denied as to HSHS, as well as any other parties.

CONCLUSION

The Ninth Circuit Court of Appeals correctly held that the Complaint failed to state a claim for relief against HSHS under 42 U.S.C. Sec. 1983.

It is respectfully submitted that Petitioners have not established there are any special and important reasons why the writ should be granted. The decision below as to HSHS did not involve an important question of federal law which has not been, but should be settled by this Court. The decision of the Ninth Circuit Court of Appeals has not rendered a decision on a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter.

Dated: Honolulu, Hawaii, February 24, 1992.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually, and in his capacity as member of the elder council of the HOU HAWAIIANS, Plaintiffs, vs. STATE OF HAWAII, WILLIAM W. PATY, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii, HERBERT K. APAKA, JR., MOSES W. KEALOHA, J.	CIVIL NO. 89-00561 COMPLAINT (Filed July 21, 1989)

DOUGLAS ING, JOHN ARISUMI, and HERBERT ARATA, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii, JOHN WAIHEE, individually and as Governor of the State of Hawaii, THE HONOLULU SAILORS HOME SOCIETY*, a Hawaii non-profit corporation, HFSL CORP., a Hawaii corporation, d.b.a. HARBOR ASSOCIATES, PETER S. SMITH d.b.a. SMITH DEVELOPMENT CORP., GLENN K. OKADA, d.b.a. G.K.O. CORP., and HONFED BANK, a federal savings bank,

Defendants.

COMPLAINT

Come now Plaintiffs, THE HOU HAWAIIANS, DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as hereditary chief of the HOU HAWAIIANS, and KAMUELA PRICE, individually and as member of the elder council of the HOU HAWAIIANS, and for Complaint against Defendants allege and aver as follows:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §§1331 and 1343. This is an action seeking relief under Title 42 U.S.C. §1983 and Title 28 U.S.C. §2201. The rights sought to be secured in this action are

rights of Plaintiffs as Native Hawaiian special beneficiaries of a trust imposed by §5(f), Act of March 18, 1959, Pub. L. 86-3, Stat. 4, (Admission Act), upon certain lands granted by the United States to the State of Hawaii by § 5(b) of the Admission Act.

PARTIES

2. The HOU HAWAIIANS is a Native Hawaiian Ohana or tribe made up of related families of native Hawaiians of 50% or more Hawaiian ancestry. Plaintiff DOCTOR NUI LOA PRICE, a.k.a MAUI LOA, is the hereditary chief of the HOU HAWAIIANS, and is a native Hawaiian of 50% ancestry. Plaintiff KAMUELA PRICE is a member of the elder council of the HOU HAWAIIANS and sues individually and in such capacity. Plaintiffs are residents of the State of Hawaii.

3. Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, is eligible for a 99 year lease of Hawaiian Home Lands and other Native Hawaiian entitlements as provided in § 5(f) of the Admission Act.

4. Defendant STATE OF HAWAII is a State of the United States of America, admitted to the Union on an equal footing with the other States in all respects whatever, by the Admission Act.

5. Defendant WILLIAM W. PATY is a resident of the State of Hawaii and is the Chairman of the Board of Land and Natural Resources of the State of Hawaii. Defendants HERBERT K. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI and HERBERT ARATA are residents of the State of Hawaii and are the members

of the Board of Land and Natural Resources of the State of Hawaii.

6. Defendant JOHN WAIHEE is a resident of the State of Hawaii and is the Governor of the State of Hawaii. (Defendants STATE OF HAWAII, PATY, APAKA, KEALOHA, ING, ARISUMI ARATA and WAIHEE are hereafter collectively referred to as "State Defendants."

7. Defendant HONOLULU SAILORS' HOME SOCIETY* ("HSHS"), also known as HONOLULU SAILOR'S HOME SOCIETY, is a non-profit corporation, duly organized and existing under the laws of the State of Hawaii for the purpose of operating a home for sailors in the State of Hawaii.

8. Defendant HFSL CORP., is a corporation duly organized and existing under the laws of the state of Hawaii, whose principal place of business is in the State of Hawaii, doing business under the name "HARBOR ASSOCIATES", a tradename duly registered with the Business Registration Division of the Department of Commerce and Consumer Affairs of the State of Hawaii.

9. Defendant PETER S. SMITH is a resident of the State of Hawaii, doing business under the unregistered fictitious name "Smith Development Corp."

10. Defendant GLENN K. OKADA is a resident of the State of Hawaii, doing business under the unregistered fictitious name "G.K.O. CORP." also known as "GKO CORP."

11. Defendant HONFED BANK, ("HONFED"), is a federal savings bank, whose principal place of business is in the State of Hawaii.

COUNT I

12. On March 21, 1893, the provisional Government of the Hawaiian Islands possessed and owned in fee simple absolute a certain parcel of land situated in the City of Honolulu, Island of Oahu, (now City and County of Honolulu, State and District of Hawaii), hereinafter called the "Defeasible ~~Lot~~", described as follows:

> Beginning at the North corner of Richards and Halekauwila Streets, and running as follows, viz: N. 30° 25' W. thence 127.5 feet along Mauka Side of Halekauwila Street; N. 51° 3' E. thence 137.7 feet along Grant 3,474 to Trustees of the Sailors' Home Society; S. 37° 50' E. thence 135 feet along L. C. A. 738 to Kaunuohua (Enterprise Mill Property); S. 54° 34' W. thence 156 feet along new line of Richards Street to the initial point.

13. On or about said date, J. A. King, Minister of Interior, on behalf of the Provisional Government of the Hawaiian Islands, executed and delivered a deed for said Defeasible Lot to Defendant HSHS, under the name "Honolulu Sailor's Home Society", for purposes and uses of a sailors' home with the condition that "if the herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors' Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." Said deed is recorded in the Bureau of Conveyances of the State of Hawaii in Liber 142, at pages 96 and 97.

14. Thereafter, on October 3, 1969, Defendant HSHS entered into a lease recorded on October 15, 1969 in Liber 6728 at page 281, demising a portion of the Defeasible Lot

together with other properties, to Harbor Properties, Ltd., as general partner of PUGET-PACIFIC, a limited partnership, lessee.

15. The portion of the Defeasible Lot demised by said lease is hereinafter called the "Subject Property" and is described as follows:

> *Parcel 1*: All of that certain parcel of land (being a portion of Deed of Minister of Interior to Honolulu Sailors' Home Society dated March 21, 1893, recorded in the Bureau of Conveyances of the State of Hawaii in Book 142 on pages 96 and 97) situated at the north corner of Halekauwila and Richards Streets, Honolulu aforesaid, more particularly described as follows:
>
> Beginning at the east corner of this piece of land, the south corner of Lot 11 of Land Court Application 685 and on the northwesterly side of Richards Street, the coordinates of said point of beginning referred to a City and County Survey Street Monument on on the center line of Queen Street near the south corner of Alakea and Queen Streets being 337.03 feet south and 45.13 feet west, and running by true azimuths measured clockwise from south:
>
> 1. 54° 34' 106.23 feet along the northwesterly side of Richards Street; thence along the northerly side of Halekauwila and Richards Streets on a curve to the right with a radius of 45.00 feet, the azimuth and distance of the chord being:
>
> 2. 102° 02' 30" 66.33 feet;

3. 149° 31' 60.04 feet along the northeasterly side of Halekauwila Street;

4. 159° 28' 10.04 feet along the northeasterly side of Halekauwila Street;

5. 231° 03' 136.12 feet along Grant 3474 to Honolulu Sailors' Home Society;

6. 321° 45' 30" 135.88 feet along lots 1 and 11 of Land Court Application 685 to the point of beginning, and containing an area of 18,710 square feet.

16. The purpose of said lease was to develop the Subject Property together with other property as a residential and commercial leasehold condominium.

17. Thereafter, Defendant HSHS and Puget-Pacific developed the Subject Property together with other property as a condominium project known as "Harbor Square", Condominium Map Number 125, according to the declaration, dated April 15, 1970, and recorded on April 24, 1970, in Liber 6978 at page 1.

18. According to said declaration, the condominium project consists of a single building with two towers known as the Town Tower and the Harbor Tower. The project is divided into the following separate estates: (a) 360 residential apartments, consisting of 10 apartments on each floor of the Harbor Tower on floors 7 through 12 and 14 through 27 and 8 apartments on each floor of the Town Tower on floors 7 through 12 and 14 through 27; (b) two commercial apartments designated as apartments 1 and 2 on the first floor and mezzanine of the Harbor Tower; (c) one apartment designated as apartment 3, and known as the Sailors' Home Apartment, consisting of

3650 square feet on the first floor and 4515 square feet on floors 2 through 4; (d) one garage apartment, designated as apartment 4, consisting of 180,980 square feet on seven levels on the mauka side and eight levels on the makai side and one level immediately above the Sailors' Home Apartment; (e) six office apartments, designated apartments 5 through 10, situated on floors 1 through 6 of the Town Tower.

19. The use of said apartments is governed by Section G. of said declaration as follows:

> G. *USE*: The Apartments shall be occupied and used only as follows:
>
> 1. The residential apartments shall be occupied and used only as private dwellings by the respective owners thereof, their tenants, families, domestic servants and social guests, and for no other purpose except that a full time residential occupant may use a portion of the apartment so occupied for his own secondary general office purposes to the extent that such use does not impair the residential use and enjoyment of that portion of the building by others. the apartments shall not be used primarily for office purposes, nor be rented for transient or hotel purposes, which are defined as (a) rental for any period less than 30 days, or (b) any rental in which the occupants of the apartment are provided customary hotel services such as room service for food and beverages, maid service, laundry and linen or bellboy service.
>
> 2. The commercial apartments shall be occupied and used only for general commercial

purposes and may include any lawful commercial enterprise therein.

3. The Sailors Home Apartment shall be occupied and used for all purposes permitted by the Society's charter of incorporation.

4. * * *

5. the office apartment shall be occupied and used for general office or commercial purposes.

Except for the above expressed restrictions, the owners of the respective apartments shall have the absolute right to lease such apartments subject to all provisions of this Declaration.

20. The Harbor Tower as described in said declaration is situated on the Subject Property. The Town Tower, the Garage Apartment and the Sailors' Home Apartment as described in said declaration are not situated on the Subject Property.

21. Since on or about April 15, 1970, substantial portions of the Subject Property have been used for purposes other than a sailors' home.

22. At the present time, no portion of the Subject Property is being used as a sailors' home.

23. The United States of America succeeded to the reversionary interest of the Provisional Government of the Hawaiian Islands by virtue of the Joint Resolution of Annexation approved by Congress on July 7, 1898. 30 Stat. 750.

24. On August 21, 1959, the reversionary interest of the United States of America in and to the Subject Property was granted to the State of Hawaii by Section 5 of the Admission Act.

25. On August 21, 1959, legal title to the reversionary interest of the United States in the Subject Property was not vested in Territory of Hawaii; and, therefore, the State of Hawaii did not succeed to the title of the United States pursuant to § 5(a) of the Admission Act.

26. On August 21, 1959, the reversionary interest of the United States in the Subject Property had not been set aside pursuant to law for the use of the United States under any act of Congress, Executive order, proclamation of the President or Governor of the Territory of Hawaii. Therefore, § 5(c) of the Admission Act does not apply to the Subject Property.

27. Immediately prior to admission of Hawaii into the Union, the reversionary interest of the United States in the Subject Property was not controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof. Therefore, § 5(d) of the Admission Act does not apply to the Subject Property.

28. The reversionary interest if the United States in the Subject Property was granted and conveyed to the State of Hawaii by § 5(b) of the Admission Act, subject to the uses and trusts set forth in § 5(f) of the Admission act, as follows:

> "The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections

> (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university."

29. By virtue of the aforesaid deed recorded in Liber 142, at pages 96 and 97, ownership and the right to possession of the Subject Property reverted by operation of law to the State of Hawaii, in trust as set forth in § 5(f) of the Admission Act, on or about October 3, 1969, when Defendant HSHS leased the Subject Property for purposes other than a sailors' home.

30. PUGET-PACIFIC was a limited partnership formed by Harbor Properties, Ltd., general partner,

Bishop Corporation, Steven J. Kolar, William J. Bain, Perry B. Johanson, W. Price Sullivan, and KBH Corporation, limited partners, by agreement dated April 1, 1969, and filed on May 14, 1969. By amendment dated December 8, 1969, REI of Arlington, Inc., a Texas corporation, a was added as a limited partner. By amendment dated October 18, 1971, KBH Corporation changed its name to Park Shore Properties, Inc., a Delaware corporation. By amendment dated April 2, 1974, A E Properties, Inc., a California corporation, succeeded to the interest of REI of Arlington, Inc., by merger. The interests of Steven J. Kolar, W. Price Sullivan, William J. Bain, Park Shore Properties, Inc., and Perry B. Johanson were assigned to Harbor Associates, by amendments dated June 23, 1981, June 30, 1981, June 30, 1981, June 23, 1981, and June 16, 1981, respectively. Harbor Associates became the general partner and Harbor Properties, Ltd., became a limited partner by amendment dated July 28, 1981. Alfred J. Ostheimer succeeded to the interest of Bishop Corporation by amendment dated August 12, 1981. Harbor Associates acquired the interest of A E. Properties, Inc., by amendment dated September 30, 1981. Harbor Properties, Ltd., was dissolved and all of its interest in Puget-Pacific was assigned to Harbor Associates by amendment dated June 23, 1982. Hereinafter Puget-Pacific and its various partners mentioned in this paragraph together with Defendants HFSL, SMITH and OKADA, will collectively be called the "Developers."

31. On September 30, 1981, Puget-Pacific mortgaged the Subject Property together with other property to HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION, to secure the repayment of a promissory note in

the amount of $3,000,000.00, which mortgage was recorded on October 1, 1981, in Liber 15851, at page 608.

32. On June 30, 1982, Puget-Pacific mortgaged the Subject Property together with other property to HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION, to secure the repayment of a second promissory note in the amount of $4,300,000.00, which mortgage was recorded on June 30, 1981, in Liber 16436, at page 174.

33. On July 1, the interest of Alfred J. Ostheimer as limited partner in Puget-Pacific was assigned to Harbor Associates, whereupon Puget-Pacific ceased to exist by virtue of Harbor Associates having acquired all of the partnership interests therein. Puget-Pacific was officially dissolved by instrument dated September 10, 1982 and filed on October 12, 1982.

34. The aforesaid mortgages were executed by Defendant HFSL, Defendant SMITH, using the unregistered fictitious name of "Smith Development Corp.", and Defendant OKADA, using the unregistered fictitious name of "G.K.O. Corp.", all purportedly acting as an unregistered partnership known as Harbor Associates, general partner of Puget-Pacific.

35. On July 1, 1982, one or more of Defendants HFSL, SMITH and OKADA succeeded to the interest of Puget-Pacific, under the registered tradename "Harbor Associates" owned by Defendant HFSL.

36. Defendant HONFED is the successor to the interest of HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION.

37. Since October 3, 1969, Defendant HSHS and the Developers have wrongfully received rents, issues and profits from the subject property, in an amount which shall be proven at the time of trial.

38. Said rents, issues and profits rightfully belong to the beneficiaries of said 5(f) trust.

39. By virtue of the foregoing, Defendants HSHS, HFSL, SMITH, OKADA and HONFED claim an interest in the subject property adverse to the trustee, the State of Hawaii, and the beneficiaries of the 5(f) trust; Defendants' HSHS, HFSL, SMITH, OKADA and HONFED's claims are without any right whatever, and said defendants have no estate, right, title, lien or interest in or to said property or any part thereof.

40. By Act 32, Session Laws 1962, the First Legislature of the State of Hawaii provided that the management, administration and control of the § 5(f) trust lands was entrusted to the Department of Land and Natural Resources of the State of Hawaii, through its executive board the Board of Land and Natural Resources.

41. By virtue of the § 5(f) trust, State Defendants, as trustees owed a duty to Plaintiffs to recover possession of the Subject Property, and the rents, issues and profits wrongfully received by the Defendant HSHS and the Developers, for the uses and purposes set forth in paragraph 28, above.

42. In breach of their duties as trustees, State Defendants have failed to recover possession of the Subject Property or the rents, issues and profits therefrom; have

further deposited all of the income from other trust properties into the general fund of the State and expended said funds upon purposes other than the uses and purposes set forth in § 5(f) of the Admission Act; and have failed to prepare an accurate inventory of all land and other property belonging to the trust estate.

44. Plaintiffs, as beneficiaries of said trust, have repeatedly requested said State Defendants to perform their duties as trustees in accordance with the provisions of § 5(f) of the Admission Act, but State Defendants have failed and refused, and still fail and refuse, to comply with said requests.

45. If State Defendants are permitted to continue as unsupervised trustees of said trust estate, petitioners and the other beneficiaries of the trust will suffer great and irreparable loss and injury, and the assets of said trust estate will be wasted and totally lost.

46. Plaintiffs have no adequate remedy at law.

47. Defendants, acting under color of state law, have deprived Plaintiffs of rights guaranteed to them by § 5(f) of the Admission Act.

WHEREFORE, Plaintiffs pray:

A. That Defendants HSHS, HFSL, SMITH, OKADA and HONFED be required to set forth the nature of their claims to the property;

B. For a decree of this court determining all adverse claims of Defendants HSHS, HFSL, SMITH, OKADA and HONFED, and all persons claiming by through and under them, to said property;

C. For said decree to declare and adjudge that the trustee State of Hawaii owns the Subject Property in fee simple absolute, IN TRUST, however, for the uses and purposes set forth in § 5(f) of the Admission act; and said trustee is entitled to the quiet, lawful, and peaceful possession thereof, in trust, as aforesaid; that all right, title, and interest of Defendant HSHS in said property reverted to the trustee, State of Hawaii, by operation of law when Defendant HSHS ceased to use all of said land for a sailors' home; and that Defendants HSHS, HFSL, SMITH OKADA and HONFED, and all persons claiming by, through and under them, have no estate, right, title, lien or interest in or to said property or any part thereof;

D. For said decree to permanently enjoin Defendants HSHS, HFSL, SMITH, OKADA, and HONFED, and all persons claiming under them, from asserting any claim whatever in or to said property adverse to the trustee, State of Hawaii;

E. For judgment against all Defendants, jointly and severally, in the amount of all rents, issues and profits, wrongfully received by Defendant HSHS and the Developers from the subject property since October 3, 1969, when Defendant HSHS ceases to use all of said land for a sailors' home, together with interest thereon at the legal rate;

F. That Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, or some other suitable person having sympathy for the issues of concern to native Hawaiians, be appointed as co-trustee with respect to the property recovered herein on behalf of the trust estate;

G. That Plaintiff have judgment against all Defendants, jointly and severally, for their costs and attorney's fees incurred herein, pursuant to 42 U.S.C. § 1988.

H. That Plaintiffs have such other and further relief as may be just and proper.

DATED: Honolulu, Hawaii, July 21, 1989.

/s/ Walter R. Schoettle
WALTER R. SCHOETTLE,
Attorney for Plaintiffs,
MAUI LOA, *et al*

/s/ Kamuela Price
KAMUELA PRICE